



POLICE DEPARTMENT

December 7, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Damian McIntosh
Tax Registry No. 942167
52 Precinct
Disciplinary Case Nos. 2009 0409 & 2011 3671

The above-named member of the Department appeared before me on November 29, 2011, December 22, 2011, February 8, 2012 & April 17, 2012, charged with the following:

Disciplinary Case No. 2009-0409

1. Said Police Officer Damian McIntosh, while assigned to the 62nd Precinct, while on duty, on or about August 4, 2009, while in the performance of said officer's police duties, did wrongfully and without just cause use excessive force when moving a prisoner, Person A, to wit: said officer lifted her body off the ground, pushed her upper body into the closed doors, causing her face and upper torso to bang into the doors.

P.G. 203-11, Page 1, Paragraph 1(b) – USE OF FORCE

2. Said Police Officer Damian McIntosh, while assigned as indicated in Specification #1, on or about September 15, 2009, while on-duty, did wrongfully impede a Department investigation, to wit: said officer made misleading statements at his official Department interview to Department investigators regarding his transport of a handcuffed prisoner.

P.G. 203 10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2011-3671

1. Said Police Officer Damian McIntosh, while assigned to the 52nd Precinct, on or about July 23, 2010, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer improperly lowered the value provided by a complainant regarding a stolen Apple "ipad" computer on a complaint report without justification.¹

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

The Department was represented by Rita Bieniewicz, Esq., Department Advocate's Office, and Respondent was represented by Eric Sanders, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2009-0409

Respondent is found Guilty.

Disciplinary Case No. 2011-3671

Respondent is found Guilty.

¹ Current reference is to an Apple iPad.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

Department called Police Officer Danielle Wright, Lieutenant Brian Winant, Captain Andrew Murray, Lieutenant Thomas Walsh and Lieutenant Michael Brill as witnesses.

Police Officer Danielle Wright

Wright, an eight-year member of the Department, testified that on August 4, 2009, she was working from 7:05 a.m. to 3:40 p.m. in the 62 Precinct, and arrested Person A for Petty Larceny. Person A was about five feet, three inches tall and weighed 130 pounds. Wright said that although Respondent worked on her tour, she had never worked with Respondent. Wright said she ordered Person A a sandwich from the same place where Respondent ordered his from and when the food arrived, Wright gave Person A the sandwich belonging to Respondent. Wright apologized to Respondent but Respondent "seemed to be a little angry that day, I guess with the confusion of the sandwich and his assignment, or change of."

Respondent was told by Lieutenant Winant to transport Person A to the hospital because she was on [REDACTED]. Wright went back to the cell area, informed Person A that she was being taken to the hospital because she was on [REDACTED], and placed her in handcuffs in the presence of Winant and Respondent. She said Person A was not pleased and protested about being taken to the hospital. Wright was not assigned to transport Person A to the hospital because she had to finish Person A's arrest paperwork. Respondent, Winant, Wright, and two Emergency Medical Service personnel (EMS) walked Person A to

the ambulance. Person A was rear-cuffed, and Respondent was holding her handcuffs while walking. Person A then started to “lean back” because she did not want to go to the hospital. She said Respondent then lifted Person A and walked through the front door of the precinct. Wright said that upon leaving the cell area, there is a desk and then swinging double doors at the exit.

Wright testified that the doors were closed and Respondent, after lifting Person A, “pushed her through the door. They both went through the door together,” but Person A’s body went through the door first and she did not know if Person A’s feet lifted off the ground. After Respondent and Person A went through the doors, Wright heard Person A using racial slurs, cursing and spitting on Respondent. Person A was escorted to the ambulance where she was placed on a gurney and a mask was also placed on her face.

Wright said that from the time they were all in the cell together until they arrived at the ambulance, she did not lose sight, and was not more than just a few feet away from Respondent, and that Respondent did not trip or fall to the ground, nor did he stop and kneel at any point. She also did not observe Person A fall to the ground. There was a big rug before the double swinging doors, but that rug was flush against the floor, and there was no other debris that might have caused someone to trip. Wright said there were other members of the service around the cell and swinging door area, but did not know who, at the time Person A was being escorted.

Wright testified that, at first, Respondent was walking at a “regular speed with [Person A], and then she had stopped and he like I said before, he seemed to be angry, lifted her and just walked quickly through the doors and out.” She said Respondent did

not go to the hospital with Person A Wright did not socialize with Respondent before or after the incident nor share a personal relationship with him.

Wright said that Respondent was working a day tour and appeared to be angry after learning that he was assigned to take Person A to the hospital. Wright believed that Respondent requested to leave early before he was assigned the transport.

During cross-examination, Wright said that she learned that Person A was on [REDACTED] after placing her in the cell. She said Person A did not need medical attention when she first brought her into the precinct and that an individual can be in Department custody, in a holding cell, even though that individual takes [REDACTED]

Wright said she was in the middle of processing her arrest when Winant asked Respondent to transport Person A. While in the holding cell, Wright used Respondent's handcuffs to handcuff Person A while she and Respondent held Person A's hands. She said Person A was "loud, screaming, I don't want to go to the hospital, I don't want to go." Wright did not consider Person A an emotionally disturbed person (EDP) at that point. Winant was there but did not ask any officers to assist Wright and Respondent. Person A was not spitting or screaming at Respondent while in the holding cell. Wright said she did not hear Person A say, "Back in the days, you know, they would lynch somebody like you for touching me" to Respondent.

Wright said that she was walking behind Respondent and Person A instead of with them because Person A was now in Respondent's custody. Wright recalled her official Department interview on September 16, 2009, and maintained that she said Person A was "leaning back and not attempting to leave...I don't recall telling [the investigator, Lieutenant Murray] at the time she was stomping her feet." Wright acknowledged that

Person A's leaning back was a form of resisting and that, "I actually didn't have a chance to do anything, because that's when [Respondent] started to lift the prisoner and walk through the double doors of the precinct. So at the time I didn't have a chance to do anything."

Wright agreed that she did not say anything about "lifting" in her official Department interview. She said that Respondent "grabbed her by the cuffs and pushed her through the door," instead of lifting Person A. She agreed that training in the Police Academy permits an officer to grab an individual who is resisting by the handcuffs or twist and move the individual around. Furthermore, she said that if an arrestee is passively resisting, an officer may use physical force or tighten the arrestee's handcuffs.

Wright said that she did not have a chance to help Respondent control Person A because "[Respondent] picked up speed as he was walking through the door. I didn't think he was going to pick her up and slam her through the door." Wright agreed that she was slightly behind and to the right of Respondent. However, she acknowledged that in her official Department interview, she said she was directly behind Respondent. She said she could not see what was directly in front of Person A. She acknowledged that there were other members of the service present, but none helped Respondent control Person A. Wright further acknowledged that Winant was behind her, Respondent and Person A, but he also did not help Respondent.

Wright said Respondent and Person A both went through the double doors and Person A's body made contact with the door but Wright did not know what part of Person A's body came in contact with the door. Wright stated Respondent did not trip or stumble over anything while going through the double doors because she was looking at his feet.

Prior to going through the double doors, Wright said she did not hear Person A curse at Respondent. Wright reiterated that she did not interfere with Respondent and Person A because Respondent already had custody of her. Wright also said she did not observe Winant intercede between Respondent and Person A and did not recall if Winant walked over to the ambulance.

Wright did not recall how Person A was placed on the gurney but noticed her in the gurney when she stepped into the ambulance. EMS was getting a face shield to place on Person A. Wright said she did not switch positions with Respondent because she was “going by what the Lieutenant was saying; and he actually put another female officer...in with Person A and took her to the hospital.” She did not recall making Activity Log entries, or giving anything to her Integrity Control Officer (ICO) regarding this incident.

Wright acknowledged that this was an unusual event and that, although Winant knew about it, she did not individually make a complaint. She did not check Person A’s status after she was removed to the hospital but believed that her ICO did.

Upon being questioned by the Court, Wright said she followed Person A out to the ambulance because “[Person A] was being loud, just in case things got out of hand. She was my prisoner, so I wanted to make sure that she was escorted with him.” She agreed that she did not feel the need to interfere between Respondent and Person A. Wright said she briefly looked at Person A’s face, while in the ambulance, and did not notice any injuries, nor did she hear Person A complain of any injuries.

Wright said that once Person A went through the double doors, she began spitting the food that she was chewing at Respondent. She said Person A and Respondent went through the double doors together, but before going through the doors, Person A kept

leaning back because she did not want to go to the hospital. Wright said, “[Respondent] was pushing her slightly where she was moving. And then...he just lifted her up and pushed her through the doors.”

During redirect examination, Wright did not know whether Respondent was directed by Winant to not transport Person A. She said that while she was in the ambulance with Person A, she did not ask her any questions because Person A “wasn’t really answering questions. She just kept on yelling racial slurs and curse words and she was to the point where I don’t think she would want to be questioned.”

During recross examination, Wright agreed that when a prisoner is being transported, that prisoner is still in police custody, not in the custody of EMS. She also agreed that the Department is responsible for the prisoner from the point the prisoner is handcuffed until the prisoner is turned over to the court system. She recalled filling out a Medical Treatment of Prisoner form but did not recall submitting it to the Department Advocate. She did not recall filling out a Medical Treatment of Prisoner form for Person A after she was “smashed into the door.” She was not interviewed by the Internal Affairs Bureau (IAB) Force Unit, and did not know whether Person A had been interviewed.

Lieutenant Brian Winant

Winant, a 19-year member of the Department, testified that on August 4, 2009, he was working from 6:50 a.m. to 3:30 p.m. and was not sure if he was on patrol or assigned as the desk officer at the 62 Precinct. He testified that he was behind the desk when a female prisoner (Person A) in the holding cell required medical attention and was “pretty irate.” He requested the response of EMS, who then treated her for the second time on

that day, and removed her to the hospital. Winant needed a member of the service to escort Person A to the hospital and assigned Respondent. He asked Respondent and Wright to handcuff Person A and stayed in the holding cell area until Person A was handcuffed. Winant stayed because he did not want Person A making any allegations against them.

Respondent “walked her from the cell area to the first set of doors leaving the precinct. It’s probably about fifty feet from the cells, maybe to the front doors. He walked with her very quickly.” He continued, “I was walking behind trying to catch up. He was holding her by the arm like he should... [about] eight to ten feet from the door. [Person A] just put her feet down like she didn’t want to walk, she didn’t want to go” and Respondent, standing behind her, put his arms on her elbows and “picked her up off the ground and physically placed her into the door, like pushing her through the door; which it seemed like with her head and shoulders, I do remember the prisoner screaming, ‘You just smashed my face into the door.’”

Winant said Respondent “pushed her at the door to swing [the first set of doors] open;” the second set of doors were already open. Respondent then walked Person A to the ambulance which was waiting outside. When Winant got to the ambulance, he noticed that Person A was already restrained and instructed Respondent to wait in the precinct and also instructed another member of the service to escort Person A to the hospital.

While in the holding cell, Person A was screaming pretty loud and acting irate and Winant could see and hear her. He said Respondent did not seem happy about escorting Person A to the hospital, and that he assigned Respondent to the prisoner transport because Respondent did not have an assignment.

Winant said he was standing approximately four feet behind and slightly to the side of Respondent and Wright was behind him when Respondent went through the double doors with Person A. Winant said he observed Person A's head, face and shoulder make contact with the double doors first. Person A was handcuffed with her hands behind her back, and just before Respondent went through the double doors, Winant observed Respondent holding Person A by her bicep or above her elbows and, "was able to see -- I knew her feet were off the ground because I saw him pick her up... from her arms and carry her through the door...I know she was off the ground. I was standing right there."

Winant was walking behind Respondent because he was going to hold open the double doors for him but could not because Respondent was walking too fast. He said it was about 50 feet from the cell area to the double doors, and six or eight feet wide.

Winant said there was nothing obstructing his view of Respondent and Person A. He did not observe either of them trip and fall to the ground from the time they left the cell area until they arrived at the ambulance. There were other members of the service present while Respondent walked with Person A from the cell area to the double doors.

Winant observed Respondent pick Person A up by her arms and place her in the ambulance. Winant instructed Respondent to wait inside the precinct because "the prisoner was very upset. She was screaming...why did you smash my face into the door. She was also screaming racial remarks as well."

Winant also observed Person A spit at Respondent. He agreed that the situation between Respondent and Person A escalated after they had gone through the double doors. He agreed that if a member of the service is assigned to transport a prisoner to the hospital, then that member of the service accompanies the prisoner from the precinct, in

the ambulance, and to the hospital. Winant explained that he reassigned Respondent "based on the fact that obviously an incident happened, the prisoner was upset, it appeared that [Respondent] was a little worked up." He continued, "I felt it proper...to take [Respondent] out of the situation so it doesn't escalate, and just place another officer to do the transport. And also I felt that it was an issue that we needed to deal with."

After the incident, Winant returned to the precinct and informed his commanding officer (CO) about the incident and misconduct. Winant believed that the amount of force used by Respondent was not appropriate. Winant had worked with and supervised Respondent but did not socialize with him before or after the incident.

Winant described Person A as a [REDACTED] female, approximately five feet two inches and 105 or 110 pounds.

He said EMS was behind him while they were walking from the cell to the ambulance. He said the double swinging doors were approximately six or eight feet from the other set of doors that led to the outside stairs and the sidewalk. He did not recall if there were other members of the service or EMS standing outside of the precinct, but said there could have been. Winant did not feel that anyone was in any sort of danger around the immediate vicinity of Person A when she leaned back.

During cross examination, Winant said he was in plainclothes while dealing with the situation. He did not recall being at the San Gennaro Feast prior to the incident, nor did he recall where the precinct's Executive Officer (XO) was, but said the CO was in the gym, in the basement, when he informed him of the incident. The CO's office was approximately six feet from the double doors, on the right hand side.

Winant said he became aware of the situation with Wright's prisoner while he was behind the front desk and did not recall having a conversation with Sergeant Walsh, but said it might have been possible. He also did not recall being told by Walsh that Person A "has to be transported to the hospital because they can see that she's not standing by herself, that she's actually sinking down in the cell..."

Winant did not recall whether Wright was in the cell or out by a table when he first went into the cell area. Winant also did not recall a prior incident with Respondent during which a "white male decide that he was going to take a summons that [Respondent] wrote for him, rip it up right in front of his face and throw it at him." In a situation such as this, Winant would instruct the officer to issue a summons for littering.

Winant recalled a conversation he had with Respondent during which Respondent said, "I'm not going to illegally stop people and write [UF-]250s [Stop, Question and Frisk Reports] and violate their rights," but did not recall Respondent making a particular reference to Mexicans. Winant did not recall telling Respondent, in response, "Remember, Police Officer McIntosh, you're one of us."

Winant acknowledged there was a foot post assigned to the male locker room but did not specifically recall Respondent being assigned to it nor did he recall the incident that prompted the fixed post. Department's Exhibit (DX) 5 is a summary of 62 Precinct Roll Calls for the months of June through August, 2009, and who was assigned to cover the locker room post.

Winant agreed that other people on the first floor of the precinct might have heard Person A because her screams were loud. He said he did not review any documents before his testimony and did not know who the arresting officer was. He said that although

Person A was yelling, she was able to be calmed down enough to be placed in handcuffs by Respondent. Winant did not believe Wright assisted Respondent at this point.

While walking towards the double doors, Winant was behind Respondent, Wright was behind Winant, and EMS followed Wright. He acknowledged that if a person in police custody, at the scene of the arrest, needs medical attention, then that person should be taken directly to the hospital. He did not recall how long Person A had been in the precinct before she was removed to the hospital but “it wasn’t that long a period of time.”

Winant did not recall if, while in the cell area, Respondent held Person A, placed one handcuff on her wrist and then asked Wright to place the other one.

Winant agreed that Person A was classified as an EDP, and that there is a special procedure for handling EDPs which requires taking more precautions. He agreed that Person A resisted and “put her feet down and wouldn’t walk out anymore.” He did not recall Person A saying, “[B]ack in the day a nigger like you would be lynched for putting your hands on me...” to Respondent while they were walking towards the double doors. Winant reiterated that while walking towards the double door, Person A stopped her feet after which Respondent “picked her up by her arms and carried her outside the precinct.”

He agreed that, based on his training, when an individual resists by stopping her feet, he can use physical force to move her, and that individual can also get hurt when force is being used by a police officer.

After Respondent went through the double doors, or “smashed” Person A through the doors, Winant said it was his obligation to notify either his CO or IAB, so he chose to notify his CO who told him [Winant] that he [the CO] “would look into it and take care

of it.” At the time Winant informed his CO of the incident, he [the CO] was exercising in the gym in plainclothes.

Winant acknowledged that prior to this incident, he had discussed the Stop, Question and Frisk Report incident [involving Respondent] with his CO but did not recall discussing Respondent’s foot post assignment in the locker room.

Winant did not recall if EMS held open the second set of doors for Respondent, or assisted Respondent with Person A. Winant agreed that he did not stop Respondent from using excessive force against Person A because he “didn’t have a chance to.” He said he did not yell out Respondent’s name because he did not think that anything was going to happen and that Respondent was in control of the prisoner even after going through the double doors. After going through the double doors, Respondent completely picked Person A off the ground and carried her to the ambulance. He did not help Respondent because he was too far away and that, “I guess I expected [Respondent] to stop and I guess I never expected him to carry her the whole way. And I guess I was taken a little off guard by the whole incident. It’s kind of unusual.”

Winant said that his version of the events would be more accurate than Wright’s version because he was directly behind Respondent.

Winant said Respondent was carrying Person A “under her arms” and did not know if there were other officers around them. Respondent carried Person A approximately 15 feet from the double doors to the ambulance, and then with the assistance of EMS and Winant, he placed Person A into the ambulance. Winant recalled Person A calling Respondent a “nigger” and being uncooperative.

Winant said, “[Person A] was placed onto the stretcher...we placed her on it, and with EMS’ help, put the straps on her.” He acknowledged that Person A was spitting at Respondent but did not recall a face mask being placed on her.

After instructing Respondent to wait inside for him, Winant did not recall any further interaction with him. He said Respondent was under control when he helped Person A into the ambulance and when he strapped her to the gurney. It took Respondent about four seconds to travel from the double doors to the ambulance and he did not yell or react to Person A’s “out-of-control behavior.”

During redirect examination, he testified that he was trained to use the minimum force necessary, and what he observed Respondent doing was not consistent with using minimum force.

Upon being questioned by the Court, Winant stated that Respondent was walking very quickly through the precinct and that, “to me common sense is, if you know you have your lieutenant behind you and at least another officer and a few EMS people, why would you use the prisoner to open the door when you know you have people behind you...” He said, “[Person A’s] arms were behind her back. He picked her up from behind her back and almost...just pushed her...basically pushed her forcefully through the door to open the door...he used her body to open the door.” Respondent did not turn around to use his own body nor waited for someone else to open the door for him.

During recross-examination, Winant said there was a desk officer and a Telephone Switch Board Operator (TS) also present while Respondent was walking out with Person A. Respondent did not stop at the front desk. Winant agreed that Person A was an EDP and volatile and that Respondent did not have to ask or tell him to open the door

for him [Respondent], but asserted that “[Respondent] should have stopped, slowed down, and waited for somebody to open the door...he’s a police officer and he should know better, too.”

Captain Andrew Murray

Murray, a 14-year member of the Department, was working in the 62 Precinct at the time of the incident and was in the rank of lieutenant and assigned as the ICO. He testified that prior to August 4, 2009, he did not have any conflicts with Respondent, nor did they socialize. On that day, was called to the 62 Precinct by the CO, Deputy Inspector [John] Spra[gu]e, and informed that Respondent, “while transporting a prisoner to the hospital, while she was rear handcuffed, pushed her unnecessarily into the initial exit doors of the 62 Precinct.” He began his investigation by reviewing the Interrupted Patrol Log and interviewing other members of the service who were present. He also went to the hospital to interview Person A, but was unable to as she was sleeping. On August 5, 2009, however, Murray did interview Person A at Brooklyn Central Booking before her arraignment. Murray wanted to record the interview but Person A refused.

Murray said, “She was coherent and I didn’t see any injuries on her face. Initially she did not want to speak to me because she thought I was there to tack on additional charges to her because she did not understand.” He continued, “I explained to her that I was...just trying to find out what happened during the incident. She said that she really did not remember being pushed into the door. She did not have any injuries. She did not have any injuries from the handcuffs.” Person A recalled spitting and saying “bad things”

to Respondent and did not "want to go forward with anything." Murray prepared a worksheet in connection with the interview.

Murray also interviewed Principal [Administrative Associate] Person C, who said that Person A's actions were similar to that of a child in that Person A was "putting her feet down and pushing back against [Respondent], not necessarily resisting to get away but more of that she did not want to go to the hospital." Person C also told Murray that Person A's hands were handcuffed behind her back, Respondent had her by the arm and was pushing towards the front door at a high rate of speed and "as [Respondent] got closer to the door, [Person C] described how [Respondent] lifted [Person A] up and hit her into the doors." Murray prepared a worksheet in connection with Person C's interview (DX 1, Investigating Officer's Report dated August 4, 2009), and said she has since retired from the Department.

Murray conducted an official Department interview with Respondent on September 15, 2009. Murray listened to the recording of the interview (DX 2) and reviewed and made handwritten corrections on the interview transcript. DX 2A is the uncorrected copy of the transcript and DX 2B is the corrected copy.

During his official Department interview, Respondent told Murray that Person A was "being resistant and not wanting to go to the hospital and saying, I'm not going, I'm not going." Respondent described handcuffing Person A as: "I bum rushed her and grabbed her and pinned her against the wall and handcuffed her." Murray recounted that Respondent described how he picked Person A up and carried her, while her hands were behind her back, "from the cell area and tried to get to the front doors as fast as he could because the lieutenant explained to him that he had to take her to the hospital. He carried

her and he said that she was trying to put her feet down on the floor so in an effort to stop that, he picked her up and during the interview, he actually demonstrated how he picked her up with his hands under her armpits.”

Murray said that Respondent told him, in sum and substance, that Respondent carried Person A about 15 feet from the cell area to the front desk and stopped at the front desk because he was tired and his back was hurting from carrying Person A. Respondent further told Murray that when he stopped at the front desk, no one was near him and that he was trying to get to the double doors and to the ambulance. Furthermore, “he describes that as he is carrying her, he gets a few feet away from the...swinging doors. There are two sets of doors and the inner doors swing out towards the outer door and the outer doors swing in so there are two sets of doors.”

Respondent said during the official Department interview that as he was carrying Person A, he tripped over a carpet and fell to the floor. Based on his investigation, Murray believed that Respondent made a misleading statement about tripping and falling over the carpet. Murray made this determination based on interviewing Person C, Walsh and Police Officers Miguel Leon, Alexander Dejesus, none of whom observed Respondent fall to the ground with Person A and then pick Person A back up, but they all agreed that Respondent was “travelling at a high rate of speed, picked her up near the doors and hit her into the doors where she could not defend herself because she was handcuffed behind her back.”

Respondent also said that after he picked up Person A from the floor, “he turned and used the left side of his hip to open the door, the right door, to open the door to go outside...he turned sideways to open the door.” Murray said that Respondent did not ask other members of the service for help, and that the other witnesses told Murray that

Respondent did not give them a chance to help him and that he “basically picked up Person A and quickly escorted her out of the cell area and walked passed everyone. Everyone was walking behind him and he did not give them an opportunity to help him.” Winant and Wright were right behind Respondent and could have offered assistance had Respondent asked for it. He said Person C and Walsh both confirmed that there were other people in the immediate area of Respondent while he was escorting Person A.

Murray said that during his interview, Respondent had alluded to or stated that one of the EMS workers had opened the second set of doors for him. Murray interviewed the EMS personnel, Catano and Cortez, who said they did not open the door for Respondent because they were behind him and the last ones to leave the precinct. Murray also interviewed Wright, who told him she did not observe Respondent fall to the floor. Murray inspected the area between the cells and the double doors for any obstructions that could have caused Respondent to trip or fall, but did not observe any.

Murray explained that a UF 250 is filled out when an officer stops, questions, or frisks someone who he believes to have committed, is about to commit or is committing a felony or Penal Law misdemeanor.

During cross-examination, Murray said he was the ICO at the 62 Precinct for just over three years and received a three-day ICO training course from IAB. Murray said that his investigation was a “self generated Internal Affairs investigation” assigned an IAB log number, but he did not notify the IAB Force Unit. He added, “I do not notify them directly. I notify the command center of Internal Affairs and they determine what unit handles the case. I do not make that determination.”

Murray acknowledged that a Medical Treatment of Prisoner form was supposed to be completed but he did not see one during the course of his investigation. Murray said his interview with Respondent was 56 minutes long, including the two breaks, but he did not know how long each break was. Seven people were present when Respondent was being interviewed, including three 62 Precinct union delegates, Respondent's attorney, and Sprague. He said Respondent was satisfied with having these people present during his interview.

Murray visited Person A at the hospital, six hours after the incident, took a picture of her, and did not notice any markings or visible injuries on her face. He agreed that a person who had been assaulted might not show the injuries initially but the injuries might be visible a few hours later.

Murray said Wright told him she could not see what part of the prisoner's body came into contact with the door because she was walking behind Respondent.

When asked if an arresting officer is responsible for her prisoner, Murray replied, "It depends on - - if I am the arresting officer on the scene and I still talking to the complainant, someone else can transport the prisoner to the precinct." He continued, "I am responsible for the arrest overall, I am the arresting officer, but at that moment if the prisoner tries to escape, I am not responsible. Overall I am the arresting officer, but I am not responsible for them at the moment..."

Murray agreed that in a situation where an officer handcuffs an individual, transports the individual from the street to the station house, places the individual in the cell and begins processing the arrest, the officer would be responsible for the prisoner.

He said Wright was not responsible for helping Respondent with Person A when Respondent “tossed” Person A through the double doors because Respondent did not give Wright an opportunity to assist him. Murray used Patrol Guide 203-11 to determine that Respondent violated Department policy.

Murray did not think Person A was considered an EDP nor did he know if Winant or Walsh designated her as an EDP. Before starting his investigation, Murray did not speak to Winant or Walsh, and understood that Person A was being taken to the hospital because EMS thought Person A was going through withdrawal.

He said the front desk is approximately 15 feet from the cell area and there is a monitor, and a glass window which allows you to see everything that the prisoners are doing. Murray did not ask Winant or Walsh why they had gone to the cell area. Murray did not review Patrol Guide 210-04 during his investigation because he “did not think they did anything wrong with regard to the medical treatment of the prisoner.” He acknowledged that EDPs can be a danger to themselves and to everyone around them.

Murray acknowledged that, according to Patrol Guide 210-04, a Desk Officer is supposed to make a Command Log entry when a prisoner is removed to the hospital. Murray agreed that long chain handcuffs were not used and also did not know whether leg restraints were used. Murray did not know that Respondent was called into the cell area to deal with Person A because Wright did not have a pair of handcuffs with her.

He said he was not informed by Walsh, Winant or Wright that Respondent rushed in the cell area because Person A was acting irrational. He agreed that some or all of the witnesses either heard Person A say she did not want to go to the hospital or they saw Person A actively resist going to the hospital. However, he added that it was a “minor

resistance...She is not resisting, she is not trying to escape, but she was trying not to go into the handcuffs." He said, "If EMS is saying that they have to, if need be, you have to physically make them go," and agreed that there are times when a police officer may use lawful physical force even though the police officer may not necessarily want to.

Murray said Respondent, while in the cell area, moved Person A by himself and that Wright could not help him because Respondent did not give her a chance to. He acknowledged that police officers do not need to ask fellow police officers for help, however, "you have to give them the opportunity to do so."

Murray acknowledged that he is not taking Respondent's words out of context because he has a bias against him and stated that none of the witnesses could say that Person A's feet, "left the ground." He recalled Wright telling him that Respondent "moved quickly, left the cell area with the prisoner...he was not carrying her, but pushing her from behind." He said there were other officers that could have helped him with Person A and there was no need for Respondent "to carry her...once [Person A is] outside of the cell area, if one officer grabs one arm and the other grabs the other arm, no matter how much she plants her feet, they can escort her properly through the doors into the ambulance."

Winant told Murray that he did not assign Wright to assist Respondent because Respondent took it upon himself to remove Person A from the cell area. Murray said Person A weighed approximately 120 pounds and that Respondent was moving "fast enough [with her] that no one could catch up to him." Murray said Wright was behind Respondent and Person A, and Winant was behind Wright. Murray agreed that Winant would be accurate if he (Winant) testified that he (Winant) was directly and a few feet behind Respondent, however, Murray believed that Winant was behind Wright.

Murray did not ask Wright why she did not help Respondent with Person A while she was walking behind them because Wright “said that [Respondent] did not give her an opportunity that she said that he took her out of the cell area and was walking very quickly so no, I didn’t have to ask her why she did not help him.” Murray acknowledged that if Wright testified that Person A’s face actually smashed into the door, then that statement would not be consistent with the statement that is on his worksheet.

Murray was aware that Person A was directing racial epithets at Respondent while they were in the cell area; however, Murray did not include this information in his worksheet, and said, “I should have been more specific as to when the racial epithets were used.” He did not ask Wright whether she heard the racial epithets but said it came up in her (Wright’s) testimony and that he did not specifically ask when it was said.

Murray agreed that Winant did not tell him that Person A told Respondent that “in the old days a nigger might be strung up for putting his hands on a white woman...” and that Wright was a “little leery on repeating what she heard.” He agreed that if a prisoner made such remarks in the arrest processing area, then there should have been other officers assisting Respondent. He did not ask Winant how Person A was acting in the cell area nor did he ask Wright how Person A got into the ambulance because he did not think it was an issue and because Respondent had already told him that he placed Person A on the gurney.

Murray said that Respondent was in front of Winant and Winant could not predict what Respondent was about to do, and that Winant did not use a voice command to stop Respondent. Winant also could not physically grab Respondent because he was “too far

back." Murray also did not ask Winant if he had ordered Respondent to "stop right there at the spot where he was doing it."

Murray said he did not know that Winant helped Respondent place Person A into the ambulance. Murray said Respondent was pushing Person A instead of carrying her, however, he said, "the disputed is where [Respondent] carried her and hit her into the doors, picked her up and carried through into the doors." He agreed that Respondent handled Person A inappropriately when he pushed her into the doors, but not prior to that.

Murray did not know whether Respondent made allegations against various members of the 62 Precinct regarding misconduct, nor did he know that Respondent had called IAB and complained about racial discrimination. He said that it was possible that Respondent had a foot post at the third floor locker room. Murray acknowledged that Police Officer Deni[ec]e Christie, a Black officer, worked in the 62 Precinct, as did Police Officer [Claude] Poli[c]art, however he did not know if they were referred to the Early Intervention Unit (EIU). Murray believed that Respondent was sent to EIU by Sprague as a result of this incident. He said Respondent's duty status was not changed because Person A did not sustain any injuries.

Murray said he did not have a discussion with Winant about Respondent complaining about the UF-250 policy in the precinct.

Murray said Person A did not tell him that she was abused by Respondent. Winant initiated the investigation by notifying Sprague but Murray did not know if Winant notified IAB. Murray explained that a self initiated investigation is conducted by the ICO of the precinct and may or may not lead to discipline and that the present case was

self-initiated because initially, Person A did not have any injuries, he could not speak to Person A and because he was instructed by Sprague to investigate the incident.

According to one of Murray's worksheets, Winant said, "Respondent was holding her by the arms and approximately eight feet from the door, he lifted the prisoner up at the door, right, and pushed her head, face and shoulder into the doors and then she claimed you smashed my face..." but Person A did not say this to Murray. Person C told Murray that she heard Person A screaming but could not say what the contents of the screams were. Wright also did not say if she heard Person A scream. Murray believed that Wright was directly behind Respondent because that is what he was told by Person C. However, he added that if Winant was "off to the side, he could have interpreted it as being behind [Person A]..."

During redirect examination, Murray explained that an officer was assigned to the locker room post because there had been two instances where members of the service had complained that their lockers were defaced or tampered with. Murray was not aware about Respondent being assigned to any punitive posts while at the 62 Precinct.

He said Winant completed a "letter to file" which is basically a written documentation of instruction given to an officer regarding patrol or any incidents. He said, "The one that Winant did regarding [Respondent] was he questioned [Respondent] on his activity and noticed...that [Respondent] had not written any UF250s and questioned him on it." He continued, "[Respondent] basically stated to Winant that [he] was not comfortable conducting stop, question and frisk[s] because he personally did not like when he was stopped so he did not want to do [it] as a police officer." Murray did not understand this to mean that Respondent was not going to fill out UF-250s.

He said it is common for a member of the service to transport another member of the service's prisoner and it was not punishment when Respondent was assigned to transport Person A.

Murray stated that the distance from the interior double doors to the exterior double doors is approximately ten feet and the vestibule area has a radiator and pictures. He said, "When you go out the exterior double doors, there is a staircase of maybe five steps, handrails on both sides and then, to my knowledge, the ambulance is usually right on the corner of the precinct. The precinct is on a corner and the double doors open up onto the corner. The sidewalk is maybe 15 feet long and the car six feet wide."

Murray agreed that in his experience, excessive force does not necessarily have to correlate with physical injury and that in some situations even minor force can be deemed excessive. Murray said that Person C told him that what Respondent had done was not necessary.

Murray stated that before he interviewed Respondent, he read him his customary rights and that everyone in the room at the time of the interview had given a voice indication so that the tape would reflect the people present in the room during the interview.

During recross-examination, Murray said Person C was not trained in police tactics, policing or the use of force, but he valued her opinion because she had over 20 years of experience. He agreed that sometimes force is needed but that sometimes it does not necessarily look like a nice thing to do. Murray agreed that people in law enforcement can disagree on what is excessive force.

Other than the letter to file, Winant did not tell Murray about the discussion he had with Respondent about the UF-250s. Respondent did not tell Murray that he was not going to fill out UF-250s, and Murray did not ask Respondent about the letter to file because he did not have a reason to. Murray, however, spoke to Sprague about the conversation Winant had with Respondent about the UF-250s and the letter to file. Murray agreed that Sprague did not tell him about a conversation between Winant and Respondent during which they discussed UF-250s and Respondent said "that people in the precinct are illegally stopping, questioning and frisking people based on their racial make up; Mexicans, blacks and the like."

Murray agreed that the locker room incident was an Equal Employment Opportunity (EEO) issue, however, he disagreed that the reason why there was a locker room post was because the officers that had their lockers damaged alleged racial discrimination. Murray did not know other officers that were assigned the locker room post but stated that the post lasted for approximately two weeks and that an officer was assigned there during every tour and it was documented on the Roll Calls. Murray said Winant had placed the letter of instruction in Respondent's file before this incident, but did not recall the exact date.

Upon being questioned by the Court, Murray said that Person C was standing around the 124 Room and close to the double doors when Respondent came out of the cell area with Person A. The 124 Room is opposite the front desk and approximately 10 feet from the double doors. Person C told Murray that Person A's face hit the door. Murray agreed that at no point did Respondent tell him that he was being punished by being asked to transport Person A.

During recross-examination, Murray said Person C was approximately 10 or 12 feet away, behind and to the side of Respondent and Person A, when she observed Person A hit the door. He added that Person C had a direct line of sight of the door and was able to see what part of Person A's body hit the door.

Murray was recalled to give additional testimony about Respondent's September 15, 2009, official Department interview. He stated that he, Sprague, Police Officers F[opp]iano, Bailey, Ribovich and a union attorney were present with Respondent during the interview. Four of the people present at the interview were there on behalf of Respondent and Murray understood that Respondent had requested them. Murray said that he and Sprague were directing questions to Respondent and recalled that he stopped the recording twice, and on both occasions, as he generally does, announced the time immediately before pausing and immediately after resuming.

He testified that the first pause occurred subsequent to Sprague requesting Respondent to consult with his union delegates and attorney in private. Respondent, his attorney and the delegates left the office and Murray did not hear their conversation. The interview then resumed, Sprague recapitulated Respondent's testimony and Respondent continued testifying but then he could not breathe or speak so he was given a break and was going to remove his bulletproof vest. He said they did not speak to Respondent during the second break nor indicate to anyone by way of a non-articulated gesture to stop the tape.

During cross-examination, Murray denied rewinding the tape after pausing it. Murray said Respondent was satisfied with his representation and believed that he had

requested three union representatives. Murray said he has conducted upwards of 15 or 20 official Department interviews and did not recall if an officer did not go forward with an interview because he was dissatisfied with his representation. He said he conducted one interview where a police officer did not want a 62 Precinct union delegate present.

Murray denied having a discussion about Winant or retaliation during Respondent's official Department interview. He was not aware of having an off-the-record conversation during the second break of the interview. He acknowledged being at interviews where there were three union delegates from three platoons. He said he did not get upset and believed he was calm during the entire interview.

Upon being examined by the Court, Murray said he was the only person in control of the recorder and indicated the time when he stopped the tape and again when he resumed.

Lieutenant Thomas Walsh

Walsh, 14 year member of the Department, testified that on August 4, 2009, he was the 62 Precinct School Safety Sergeant but worked at the front desk, at about 2:00 p.m. because he was relieving Winant during his meal break. Walsh said he had worked with Respondent prior to this incident. He testified that he directed Respondent to transport Person A. Walsh had seen Person A prior to August 4, 2009, because she had been arrested and brought to the 62 Precinct before. He described Person A as a skinny, White female approximately five feet five inches tall. Walsh said he was doing periodic checks on the prisoners and when informed that Person A was in need of medical attention, he went

and checked on her before calling an ambulance. He did not recall who had informed him that Person A needed medical attention.

Walsh said when he observed Person A inside of the cell, she was not cursing or making any statements and also that he did not know if she wanted medical attention. Walsh returned to the desk and then directed Respondent to transport Person A. The desk was to the right of, and approximately ten feet from the holding cells and Walsh was able to see the cells from his position at the desk.

He said there are about four or five steps that lead into the precinct, a set of double doors, a vestibule and then another set of swinging double doors. Each door has a glass pane and “a metal grate or some sort of metal across the front of them,” and Walsh had a view of the interior doors from where he was sitting at the desk. He said that from the front desk, the double doors are approximately 30 or 40 feet to his right hand side.

He said that within those 30 feet, “it would be similar to the way the set up is here [in the courtroom]. You have to go around, out the back here to go to the doors. There is also a civilian waiting area set up right in front over here [indicating Judge’s partition in the courtroom] with like a half wall partition.” He said the partition comes up as high as “the bench that separates this part of the courtroom where the audience sit[s].”

He said he observed Respondent transporting Person A but did not recall whether Respondent stopped in front of the front desk or passed in front of the desk but said that Person A was handcuffed behind her back and Respondent was holding one of her arms and escorting her to the front door. Walsh said Respondent was with Wright, a lieutenant and two EMS personnel. Walsh did not observe Respondent leaving the holding cells while holding Person A, but did observe him when he was going to the front doors. Walsh said, “I

observed him as he was walking to the front door. When he got there, he pushed the prisoner into the front door.” Walsh was able to see the top half of Person A’s and Respondent’s bodies because the partition prevented his view of their lower bodies. Walsh heard the noise when Person A hit the front door and then heard Person A say that the officer had pushed her into the door.

Walsh testified that he did not see Respondent fall or lose control of Person A and then fall. He added that from where he was sitting, he would have seen Respondent and Person A “disappear” behind the partition had they fallen, and that he could not see below their waist level. He also did not observe Respondent kneel, stop or pause for any reason, and said that other members of the service were following behind him while Respondent went through the door with Person A, but did not recall how far behind they were.

Walsh said he did not hear Respondent ask for help nor did he appear to need help because “he seemed to have control of the prisoner as they were walking out to the front door.” He said Person A would take a few steps and then stop because she did not want to go to the hospital. Walsh agreed that what Respondent did was not in line with a police officer’s training regarding a prisoner transport and that “there was no need to push her through the door. There were plenty of people there to open the door for him.”

Walsh said he was not aware of any urgency that would necessitate Respondent going through the double doors like he did. He did not recall getting up from behind the desk and did not give a verbal command to stop Respondent because “they went outside. Once they went through the doors, they continued outside and there was lieutenant outside as well.” Walsh was unable to see Respondent and Person A through the glass

partition after they exited the double doors. He did not follow them outside and did not know how Person A was placed into the ambulance.

Walsh stated that he did not have any conflicts with Respondent and did not recall issuing him any form of discipline. He did not recall how long after the incident he remained in the desk officer's seat. Walsh was interviewed by the ICO but did not take part in any form of the investigation. After having observed Respondent's actions, Walsh did not notify IAB or the CO.

Walsh did not see if Respondent's head was leveled with or raised higher than Person A's head. He did not recall why Person A needed medical attention or if it was his or Winant's decision to assign Respondent to the transport. Walsh was at the desk when Person A was being handcuffed and was not watching her nor able to see her.

During cross examination, Walsh believed Person A's previous arrests were for narcotics but he did not recall Person A being taken to the hospital. Walsh did not relay information about Person A's previous arrest to Wright or to Respondent. Walsh went into the cell area because he was informed that Person A needed medical attention, but did not recall who informed him.

He did not hear Person A yelling, screaming or using racial epithets, and did not recall if he was standing with Respondent when EMS first arrived. Walsh was not sure if he was standing in the cell area with Winant and did not recall if Winant was dressed in shorts and a shirt and going to the San Gennaro Feast. He did not recall where the CO or the XO were.

Walsh agreed that the Desk Officer is responsible for everything that happens in a precinct but did not recall making entries in the Command Log as to why EMS had been

called. He said a Command Log entry should have been made if EMS transported a prisoner from the precinct but did not recall if one was actually made. He agreed that according to the Command Log for August 4, 2009 (marked for identification as Respondent's Exhibit A), an entry was made for Wright's arrest at 1105 hours. If the prisoner needs to be transported to the hospital, the Desk Officer makes a notation next to the arrest entry. Walsh acknowledged that he was the Desk Officer at the time Person A was removed to the hospital and he had not made an entry in the Command Log.

He did not recall if a Medical Treatment of Prisoner form was completed, but said that sometimes it can be completed at the hospital and that it is usually done by the arresting officer. Walsh acknowledged that EMS issues an ACR (Ambulance Call Report) number when they are transporting a prisoner to the hospital and that the ACR number is not in the Command Log either.

Walsh did not recall if Person A was deemed an EDP and also did not recall her cursing at Respondent. He agreed that he could relay information about Person A's narcotics exposure to other police officers but if this information is not documented anywhere, then other police officers would not know. He agreed that documenting narcotics exposure is a criterion that is documented after a person has been arrested.

Walsh said that Wright was no more than five feet behind Respondent and Person A, but did not know where Winant was. He first observed Person A stomp her feet in front of the desk, while Wright was still behind her, but Wright did not move towards Respondent to help him. Walsh did not say anything to Person A or to Respondent because they continued to walk to the front door. He said the double doors are diagonal from the front desk. He said he had an unobstructed view of Respondent at all times and did not

observe him stumble or fall down. He observed Person A stop approximately two times while Respondent was removing her from the cell area to the double doors.

According to his training in the Police Academy, Walsh did not think that what Person A did was a form of resistance. In a situation where an individual lets her body go “limp” or stomps the ground or says, “I’m not going to go,” Walsh said he was not taught to move the individual. However, he then said that the individual will move with the police officer or with the police officer’s partner. He agreed that “cuff control” involves applying pressure on prisoners’ wrists to get them on their toes and then move them. He agreed that the prisoner or the public does not have to like the fact that an officer is moving a prisoner. He also agreed that other police officers do not have to like the fact that a police officer is taking some kind of action against a person and that it is neither improper nor illegal.

He did not recall how many officers were present to assist Respondent but agreed there was more than one. Walsh said he could not tell if Person A’s face or upper body hit the double doors first, but that “it looked like her face and upper body.” He agreed that it would be inconsistent with what he observed if someone had testified that Person A was “slammed into the door.” Because of the angle he was situated in, Walsh could not tell if Respondent was “a far distance” from Person A.

During his official Department interview, Walsh did not tell Murray that Respondent lifted Person A off the ground and pushed her into the door. He did not recall if there was a TS that day and agreed that if a prisoner had been injured by a member of the service, it would have been documented on a Department form, and a notification to IAB would have also been made.

During redirect examination, according to Murray's worksheet summarizing Walsh's interview, Walsh did not state to Murray that he observed Respondent lift Person A up. Walsh testified that he did not get up after observing Person A stop twice because Respondent was in control of her, and based on his experience and training, he did not feel the need to intervene.

He agreed that Person A's prior narcotics arrests did not signify that she was a dangerous individual and his failure to indicate to Respondent that Person A had been previously arrested did not pose a safety threat.

During recross-examination, he agreed that police officers get hurt in the line-of-duty because they deem a person safe and that he cannot always determine that a person will be a safety risk. He further agreed that just because Person A weighed 120 pounds, it did not make her safer than anyone else, and that she could have been just as much of a safety hazard as anyone else, especially if she was on drugs. He did not recall if Person A was "coming down off a high" or if she was standing and sliding down because she was on [REDACTED].

Upon being questioned by the Court, Walsh said Person A had told him that she did not want to go to the hospital. He did not know if Winant went to meal and then came back. He said Respondent did not engage in any misconduct prior to the double doors, and after the door incident, he did not take any action with regard to Respondent's misconduct because Winant was conducting his investigation. He said there was no misconduct when Respondent walked passed the desk while holding Person A by the hand.

During recross-examination, Walsh said that when he observed the misconduct occur at the door, he did not notify IAB. He said Winant began his investigation when he

returned to the precinct, but that Winant's investigation did not relieve him of his obligation to notify IAB. Walsh denied not having called IAB because he did not observe any misconduct.

Walsh said he observes all prisoners who are being escorted out of the precinct. He agreed that it was not unusual for Winant to walk out of the precinct with Respondent and Person A.

Lieutenant Michael Brill

Brill, an 18-year member of the Department, has been assigned to the Quality Assurance Division (QAD) for ten years and is the team leader of a confidential investigation team that is responsible for investigating allegations of improper crime reporting throughout the city.

He testified that approximately May, 2010, he was called to investigate allegations referred by IAB involving the 52 Precinct CO, Deputy Inspector [Person B]. It was alleged that the reports of robberies were being downgraded and that Person B was making the Crime Analysis Sergeant "change all real charges to fake."

During his investigation, Brill looked at all old Complaint Reports but focused on those categories where a report might be downgraded and narrowed it down to three categories: Grand Larceny from a person, Petit Larceny and Criminal Possession of Stolen Property. He looked at an eight-month time period from January, 2010 to August, 2010, and reviewed a total of 830 reports which consisted of approximately 80 Grand Larceny reports, 700 Petit Larceny reports, and a handful of reports of Criminal Possession of Stolen Property. He reviewed the handwritten, as well as the computer

generated copies, and also called all the complainants to ensure that what they told the officers was in fact on the reports.

He highlighted 14 reports, none of which were upgraded to the crime of Robbery, which were improperly classified and required a change in classification. He said he was alerted to the 14 reports for different reasons, “a call back to a complainant might have resulted in different information being ascertained. Often times, it is just a review of the report itself.” He continued, “There were no reports upgraded to robberies, but we did come across a handful of reports where there were alterations to the property values. All of these were from the category of Grand Larceny.” He said there were no incidents where he determined that that a Petit Larceny or Grand Larceny should have been classified as a Robbery.

Brill interviewed Respondent regarding a Lost or Stolen Property/Identity Theft form (DX 3) that he had filled out in connection with a Compliant Report Worksheet (DX 4) he had taken on July 23, 2010, which had been misclassified. He said that DX 3 indicates Respondent made a handwritten change to the property value of an iPad. The form indicates that an entry can only be changed by the complainant who is to initial each change. Brill said Respondent had an opportunity to review DX 3 and DX 4 and eventually acknowledged that, on DX 3, Respondent changed the value “in an effort to change a higher value for a lower value.” Respondent indicated that he changed the value because the complainant told Respondent that he had the iPad for a while. Initially, the value of the iPad listed was \$825.00, and Brill recalled that Respondent had changed it to \$325.00. Brill did not recall if the complainant had indicated a depreciation of the iPad’s value.

Brill explained that at the time the report was taken, there was a Department procedure that provided that if a laptop was the only item stolen and it had been purchased in excess of \$1,000.00 and it was over a year old, then it would have been prudent to classify the theft as Petit Larceny. However this did not mean that the member of the service taking the report would have been able to change the value of the item. Instead, if the laptop met the aforementioned criteria, the officer would explain in the narrative section of the Complaint Report that the laptop was purchased over a year ago and that was why the report was being classified as Petit Larceny.

Brill said that on DX 4, Respondent changed the value of one of the three items listed as stolen. He said the old Department procedure regarding the laptop was in place for approximately four or five years and agreed that in order to accurately take a report of a lost or stolen laptop, asking how old the laptop was would be part of the inquiry. He agreed that "a while" with no follow-up question was not sufficient to determine how old the complainant's iPad was. Brill said he tried numerous times to interview the complainant via telephone but was unsuccessful.

Brill explained that if Respondent was confused as to whether the Department procedure encompassed iPads, he could have called or asked a supervisor, but Respondent had acknowledged that he did not.

Brill did not believe he asked Respondent if he had consulted with a guide or the internet about the value of an iPad. Respondent indicated that he was not pressured to nor received instruction from a supervisor to change the value of the iPad. Brill said that the classification would have been Grand Larceny, instead of Petit Larceny, as it was

checked off on the report, if Respondent had not made the alteration. Brill was not aware if Respondent had alerted anyone about lowering the value of the iPad.

Subsequent to his investigation, Brill had a Complaint Report Follow-Up prepared which amended the original report and classified it as a Grand Larceny.

During cross-examination, Brill said that there are reports that are downgraded that can be attributed to the initial responding officer doing something wrong. He acknowledged that a typical allegation is that COs, or at least the people who work for them, are downgrading reports. He agreed that downgrading reports benefits the COs in many respects because reducing crime might be a criteria that they are measured by. He did not know if COs were making adjustments on the reports but the allegations stated that they were somehow influencing the changes being made. He acknowledged that a police officer should not care if an iPad is \$1.00 or \$10,000.00, and did not know what the benefit might be to the police officer for downgrading the report but said there might be another reason why someone might.

Brill agreed that Respondent did not receive a benefit from the report he prepared and said that it was possible that it could have been a training issue. Brill interviewed one lieutenant, three sergeants and eight or nine police officers and did not know how many police officers were assigned to the command. Brill did not specifically recall asking the officers he interviewed if they were being told how to value the property. Brill did not know whether Respondent was a “specialist in property evaluations,” and also did not know the functional difference between an iPad and a laptop.

Brill agreed that the laptop procedure was still active in the Department Crime Report Complaint Reporting System Reference Guide in 2010. He also agreed that the

Reference Guide provides information on determining the value of laptop computers. He said that in certain situations it may be difficult to valuate the lost or stolen item but that it is best to go by the complainant's valuation of the item. He agreed that going to Apple's website to determine the iPad's value would be one method of determining the possible value but an officer is not necessarily required to do that.

Another officer that Brill had interviewed regarding Respondent's report told Brill that he would ask the complainant how old the property was and based on that "mention to the complainant that it depreciates and would somehow lower the value that the complainant agrees upon." Brill said that the difference between Respondent's answer and this other officer's answer is that Respondent did not tell the complainant that he was changing the initial value of the item. Brill recalled that other officers that he interviewed denied having made changes so those officers were not asked how they would determine the value of the property. He added that it is possible that training would alleviate the problem of determining the value of an item. Brill was not aware of any benefit that Respondent derived from reducing the value of the item.

During redirect examination, Brill said that one reason why an officer might change the classification from Grand Larceny to Petit Larceny is that if the classification is a Grand Larceny, then the officer would have to take additional investigative steps and request the response of a patrol supervisor to the scene. He agreed that according to Department procedure, it would not be okay for Respondent to change the value of the item if he was confused in believing that the iPad was a laptop.

Brill explained that an officer is prohibited from changing what the complainant has written down because "there would probably be value reports of Grand Larceny i[f]

officers were allowed to arbitrarily cross off and change the values as reported by complainant. That would [be] done merely in an effort to avoid the value being \$1,000 of things that will be changed from \$500 to \$300 and \$400 to \$200 and they would just keep the value under \$1,000.”

Brill agreed that the Reference Guide provides rules such as the laptop rule to aid officers in determining the value of items because officers in the field are not experts. He stated that Respondent did not follow Department procedure because he made physical changes that were not in accordance with Department guidelines and because he altered the value of the item without providing any justification as to why he chose to write the new value. Brill said that at the time of the incident, he believed that iPads were significantly more than \$300.00.

He said that the other officer he interviewed regarding Respondent’s report did not speak to the complainant because he was directing traffic.

During recross-examination, he stated that another reason why an officer might not classify the report as a Grand Larceny was because “they have other jobs to handle and they could take shortcuts rather than just classify it as a Grand Larceny and have a boss respond and wait for the bosses and speak to the complainants. They might take a shortcut and classify as a lesser crime.” However, Brill said that in this instance he did not know that to be the case and also did not find a motive for Respondent.

Brill could not say how often he had seen officers downgrade a crime for their personal benefit because he had not always been able to ascertain what possible benefits they might receive, “there definitely have been instances where officers have received disciplinary actions and the exact reason for them changing the report could not be

ascertained so it is possible that they were receiving some type of benefit, but we did not conclude that that was definitely the case."

He said his investigation uncovered that there were misclassified reports. The 52 Precinct's Crime Analysis staff was retrained but they were not charged with misconduct because there was no evidence that they were responsible for any of the changes on the reports.

Upon being questioned by the Court, Brill said there was no finding of misconduct in this instance, but rather, it was determined as other misconduct noted and it was recommended that Respondent be issued a Schedule "B" Command Discipline.

Brill said there are definitely instances where complainants might over inflate the value of an item, however, with respect to Respondent's report, it did not appear that the complainant was exaggerating the value. In the details section of a Complaint Report, an officer can explain why he reduced the value of an item.

Brill stated that there are training supervisors in every command and that it is "quite frequent that the type of training is crime classification and in all likelihood they will go in and explain training sessions you determine that the laptop is over a year and to make an indication of that in the detail section of the complaint report," however, Brill did not know if Respondent received this instruction.

During recross examination, Brill agreed that he does not have any independent knowledge as to whether or not police officers are taught to analyze the item before classifying it.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent, a six-year member of the Department, was first assigned to the Field Training Unit (FTU) in the 62 Precinct. While in FTU he said he wrote summonses and made arrests, and then after three months his sergeant informed him that because he was ahead of other cops, he only had to be in FTU for three months instead of the full six months. He testified that while he was in FTU he was required to write "1 and 18" and this number of summonses was passed along and he was told what was expected of him and "they would come to you like once a week and ask you to tell them where you at so if you say you was like at 1 in 10 they would be like okay we are going to put you in an RMP and we expect you to get up to what you are supposed to be at by the end of the month."

He acknowledged that if he did not get that number of summonses, there would be a penalty, but he was told in a nice way that "you would be motivated and depending on how long it took you to get to your numbers then it depends on which location you would get to be motivated at." Respondent said he was required to write UF 250s even if he had a problem with it or whether he wanted to or not.

While in FTU, he said there were only two minority police officers, including him. As a minority officer, Respondent said that the way he was treated depended on the supervisor he had. If there was a fixed post on a corner, some supervisors would rotate

the post, whereas others “are like just didn’t give a crap,” and some would just say “close your mouth and suck it up and do what we tell you to do.”

After FTU, Respondent worked the midnight tour with two other minority officers, Policart and Marlon, and was not “bothered” by Sergeant Delusso, his supervisor at the time, because he “brought in [his] numbers.” Delusso wanted a certain number of “B” or moving violation summonses, and Respondent brought them in. Delusso told Respondent that he never complained and brought him what he expected and that if he [Delusso] did not have to hear from “the people up top,” meaning the platoon commander or the CO, then he was fine. At the time, in 2007, the CO was Patroni.

Respondent testified that he began having problems when he was transferred to the day tour in early 2009, and had Winant as his supervisor. He was assigned to squad B1 and his immediate supervisor was Sergeant [Salvator] Loc[i]do.

He testified that in March, 2009, he had arrested someone and when he returned to the precinct with the prisoner, the third platoon sergeant asked Respondent if it was okay if Respondent’s arrest was reassigned to an officer from the third platoon. Respondent agreed to have his arrest reassigned since Respondent and his partner already had their arrest for the month. Later that month, Respondent was asked by Locido to respond to Rite-Aid pharmacy where he was assigned an arrest because Winant did not like the fact Respondent gave his arrest away to the third platoon. Respondent explained that he had school that evening but agreed on processing the arrest.

Respondent testified that subsequent to the Rite-Aid incident he noticed that he was no longer performing patrol, but rather he was being assigned to do prisoner

transports. He said his name would be scratched from assignments such as covering sectors and reassigned to do a prisoner transport. Also, a month after the Rite Aid incident, he spoke to Winant who told Respondent that he had certain goals that he had set for his platoon and that he could not meet those goals if he [Respondent] kept giving away his arrests. Respondent explained that he and his partner already had an arrest and that he was just trying to help out another officer but Winant told him, "I expect the platoon to come in with certain numbers I don't care if you got one arrest and if it deserves a collar you are going to process this anyway..."

Respondent said the conversation "got heated" and he stopped speaking because he did not want to be disciplined for insubordination. Winant convinced Respondent to speak and told him that he "left his rank at the front door" and that he could say whatever he wanted to say. Respondent explained to Winant that he was a good police officer and that he did not have any problems with anyone, but Winant told Respondent that he was causing him not to meet his goals that he had set for his platoon and that he was not completing any UF-250s.

Respondent told Winant that with regard to the UF-250s, the Mexican population was being picked on and that "they usually try to steer you in the precinct they tell you certain people you know not to mess with because over the time being in the 62 it was like go to that area of the precinct." Respondent said the sergeants that he had told him that if he wanted to "generate activity," including UF-250s, he should go to the Mexican side of the precinct.

Respondent also told Winant that his sergeant was changed to Sergeant Palmeri who had a problem with him and who was rude to him and would "get in [Respondent's]

face." Palmeri would also threaten Respondent and come off as "more of a gangster than a supervisor," and on one occasion, Palmeri, after reviewing Respondent's activity, told Respondent, "I think you can do better, he got in my face and says you're going to do better whether you want to do better or not..." Respondent also said that Winant asked him if he should be retrained in completing UF-250s and whether he was going to fix the UF-250 problem or not.

In June, 2009, Respondent had responded to an EDP job where Palmeri also showed up. Palmeri asked Respondent's partner to escort the EDP to the hospital and asked Respondent how his activity was for the month. Palmeri reassigned Respondent to a solo post and told him to drive around and "get some activity." Palmeri then asked Respondent to meet him at Caesar's Bay shopping center where he told Respondent, "[N]ow you are going to learn who the boss is...I am going to drive to this parking lot and get you your numbers..." and ordered Respondent to write parking summonses to vehicles that were parked in the fire zones in the parking lot.

Respondent had been walking behind Palmeri's patrol car while in the parking lot. Respondent said he was "dripping wet" from all the walking and believed he was going to vomit because of how hot it was. At one point Palmeri got out of the car and asked Respondent if he was going to give him his numbers, but Respondent did not reply. At another point Palmeri told Respondent, "[I]t hot out here ain't it?" and, "[Y]ou like complaining don't you?... [Winant] told me what you said." Respondent said he did not reply to Palmeri's comments. Before Palmeri left, he told Respondent to make copies of whatever summonses he wrote for the day and to leave copies of them in his mailbox. Of

his command, Respondent said it was “hell being there” and that whenever another precinct needed coverage, he would be the one assigned to it.

Respondent testified that toward the end of June, 2009, he responded to a domestic dispute where a woman alleged that her boyfriend beat her up. Sergeant White responded and Respondent informed him that the woman had said that the boyfriend “has family members who are cops and that’s one of the reason why she never called 911 because every time the other cops they would come he would use the fact that he got family on the job to get out of going.” White instructed Respondent to arrest the boyfriend.

While processing the arrest, Respondent, in the narrative section of the Complaint Report, described the woman’s account of the incident, including that she had “not called 911 previously because of other cops making her feel it was her fault because the [boyfriend] had family on the job.” Respondent submitted the Complaint Report to the desk officer at the time, Sergeant Mooney, who told Respondent that she was not going to sign the report and told Respondent, “[Y]ou are going to make IAB come here for this. You are going to get cops in trouble,” and, “take it to your boss and let him sign it.” White signed the report and instructed Respondent to notify IAB.

At some point in July, 2009, and approximately two or three days after the Complaint Report incident, Respondent was transferred to the third platoon and was informed by Administrative Lieutenant Lazaro that his tour change “came from up top,” which meant that it was either the XO or the CO, Sprague. Respondent said he begged Lazaro to change his tour as he was enrolled in school, taking evening classes twice a week and had already paid for the semester.

While working on the third platoon, Respondent said that he was assigned to the locker room post and had to stand in front of the toilet and was not assigned a meal period. He said the following day he was assigned again to the same post, and then “[d]epending on which sergeant you had days turn into weeks just standing there on the third floor...” He said some sergeants would allow him to take personals while others would allow him to take meal, but would not allow him to leave the precinct during his meal period.

Respondent testified that he called IAB again and told IAB that his tour was changed after he notified them about the Complaint Report incident. IAB sent investigators to Respondent’s residence and Respondent described the racial incidents in the precinct. He told IAB that some cops were not getting along and other cops were fighting each other. He also told IAB that he was being punished because he did not want to write UF 250s and about the incident that had occurred with Winant.

Respondent further told IAB that the bosses were “messed up” and there was favoritism in the precinct and that he was being punished for “trying to do the right thing but they’re in there carrying on with the other female police officers...[and] that everybody knew the CO’s mistress was another female police officer.” The female officer would bring her pet dog to the precinct and to Roll Call and that “she and the CO be in the precinct like battle royal to where we couldn’t even have roll call because we could hear the two of them, they would have disputes in the precinct and they...tell us to get out of the muster room...” Moreover, Respondent told IAB that Lazaro “had his girl up there and how when she is supposed to be at work she wasn’t at work,” and that other police officers brought their kids to work and one officer had enrolled her kid in a school

Respondent was standing by the desk when he noticed Person A leaning against the wall and sliding down; he did not see anyone sitting in the cell area with Person A.

Respondent changed into his patrol uniform and met with Walsh in front of the holding cells where Walsh informed him that he was waiting for EMS. Respondent ascertained who the arresting officer was so that he could prepare a Medical Treatment of Prisoner form as Walsh did not know if one had been prepared. Respondent learned that the arresting officer was Wright and that she had left Person A unattended in the cell area. After EMS arrived, Walsh left the cell area and returned to the desk and Wright still had not returned. While EMS was speaking to Person A, she “started like wigging out . . . that’s when she started complaining she ain’t a junkie, she ain’t on nothing, she is okay” and started yelling and screaming in a loud voice.

Respondent learned that Person A had previously called 911 and refused medical attention, and that she could not refuse medical attention again and had to go to the hospital. At this point, Walsh returned to the cell area and spoke to EMS and EMS informed Walsh that Person A has to be removed to the hospital. Walsh agreed with EMS and said, “[W]e are going to [designate her an] EDP let me go get the lieutenant.” Respondent said that while he was standing by the cell area, Person A began “bugging the heck out, she is cursing at EMS, she is cursing at everybody I’m not no junkie, nothing.”

Respondent testified that Walsh returned with Winant, who was in plainclothes, and had been at the San Gennaro Feast earlier. EMS informed Winant that Person A needed to be removed to the hospital, but Winant insisted on going in the cell area to calm Person A down and returned shortly after Person A cursed him out. Wright retuned to the cell area and also tried calming Person A down, but was unsuccessful.

While waiting in front of the cell area, Walsh told Winant that Person A was an EDP but Winant did not say anything. Respondent was instructed by Winant to "go in the cell and take her out," while Wright was standing by the cell "dress[ed] down." Respondent went into the cell but Winant and Walsh remained outside by the cell doors. When Respondent requested leg shackles for Person A, Winant said, "You are delaying the inevitable get in there" and Respondent was not given leg shackles or extra sized handcuffs.

When Respondent went into the cell area he noticed Person A backing up and pressing herself against the wall "and just going crazy so like I went in...she is basically running around in the cell so then I just grabbed her..." He continued, "I'm holding her like this with my hand, I am like Wright cuff her, cuff her and that is when Wright goes I ain't got handcuff...that is when I used my body an I like pinned her and I spinned her around and I took my handcuffs out while she is basically trying to punch me..."

Respondent said that Winant was standing outside the cell watching and did not come into the cell to help him.

Respondent testified that one EMS worker was in the ambulance and the other was watching Respondent, and that Wright did not physically assist him with handcuffing Person A. After handcuffing Person A by himself, Respondent said she began kicking and screaming but he removed her out of the cell. Respondent said Person A called him a "nigger" and began telling him that "back in the days niggers can't touch white women you should be hanged from a tree..." While Person A was making such remarks, Winant and Walsh were "standing there and watching" and did not ask another officer to aid Respondent.

Respondent said he used physical force to handcuff Person A and then tried to walk her towards the front door but Person A tried to stop Respondent by stomping her feet and calling him a "dirty nigger" and tried to spit at him. While Respondent walked towards the front door, Winant, Walsh and Wright were behind him standing by the entrance and watching him and talking amongst themselves. He agreed that they were not walking four or five feet behind him and said that he used the cuff-control technique to make Person A walk.

Respondent stated that while he walked Person A towards the front door, he tripped and fell down with her over a carpet which was laid across the floor from the front desk to the front door. At this point, Respondent said Winant was about 10 or 15 feet away from him while Walsh and Wright stayed behind and were still talking to each other. He agreed that he was not being violent with Person A but that he was moving fast with her because she was spitting at him and he was "dodging her spit." He recalled seeing other police officers around, but did not receive assistance from them. He acknowledged that in the Police Academy, he was taught how to use force and to help other officers without being asked for help.

Respondent said he fell "flat down" or was on his hands and knees, in front of the door and Person A fell on her face. He felt embarrassed, picked up Person A and continued walking out the front door. He said EMS held the front door for him as he walked out with Person A.

Respondent testified that he carried Person A through the door, and explained that by "carried" he meant that he walked her out the front door. He said he did not physically pick her up nor slam her into the door. Respondent agreed that he and Person

walked through the front door together. He stated that Person A was struggling after he picked her up and agreed that he stood her up and walked her out the front door. He said EMS was opening the door and the door was not completely open as he was walking out with Person A. Respondent maintained that he did not push Person A through the front door but said, "I pushed her, I pushed her out" in order to get Person A through the door. He agreed that he used physical force to push Person A out through the front door.

After the doors, there was a vestibule and then about two or three steps. While in the vestibule, Respondent said Person A was still behaving the same way and that Winant was still behind him but did not physically assist him in getting Person A through the front doors. He said the distance between the first set of doors and the second set of doors was approximately five to ten feet and that the second door was open.

While Respondent was walking Person A down the stairs, he said she was still behaving the same way but he was not assisted by Winant, Walsh or Wright. He said he used physical force, and twisted her handcuffs, to push Person A from the stairs to the ambulance because she did not want to walk. He agreed that he was taught to use necessary force to make an individual walk if that individual refused to walk.

Respondent arrived at the ambulance where EMS assisted him with getting Person A into the ambulance. Respondent said, "the EMS guy grabbed one side and he pulled her because she was trying to spit and he was telling the other guy to grab the [face] shield." Respondent pushed Person A from the back while EMS pulled her from the front. While Person A was in the ambulance, Respondent said she was just "bugging out. She was acting nutty. That is when the guy strapped her down on the gurney and the other guy put the shield thing over her face." He agreed that EMS were able to lay Person A down on the

gurney and then strap her in. Respondent was standing on the back bumper of the ambulance at the time.

Once Person A was strapped to the gurney, Winant "came running out of the precinct." Walsh did not come outside and Respondent did not recall if Wright had either. Respondent testified that Winant came outside, began yelling at him and told him, "you fucking got what you wanted, I said what you mean? [Winant] goes that's the worst case of police brutality me ever seen. I said what do you mean police brutality? He said yes you threw that woman into the door. I said what do mean threw that woman into the door?" Winant then told Respondent to go into the precinct and assigned Police Officer DeJesus to escort Person A to the hospital.

Respondent, while in the precinct's 124 Room, observed Winant return to the precinct and tell Walsh that he was going to get the CO, Sprague, and after hearing this, Respondent used his cell phone to tell Ribovich about the incident. Respondent said he did not hear what Winant said to Walsh but assumed that Winant was going to tell Sprague about police brutality. At the time, Sprague was at the San Gennaro Feast. Respondent was waiting in the 124 Room for approximately one half hour when he observed Sprague in plainclothes and Ribovich return to the precinct. Sprague continued walking but Ribovich spoke with Respondent privately and Respondent told Ribovich about the incident.

Ribovich then spoke to Sprague, and when Ribovich returned, he told Respondent that Person A is a "crack head everybody in the precinct know she is EDP, it's garbage because I asked him that's it? He said yeah, garbage, go sign out the CO don't want to talk to you." Respondent was not interviewed that day.

A month after the incident, Respondent received a notification from the ICO, Murray, informing him that he was going to be interviewed regarding a supervisory complaint, by Winant, of excessive force. Winant also issued Respondent a Command Discipline but Respondent never saw it. Winant did not tell Respondent that he did not report this incident to IAB.

In September, 2009, Respondent informed Ribovich about the Command Discipline and the official Department interview. Ribovich told Respondent that Winant "did not want to let this thing go," so Sprague had to conduct an investigation. A few days after Respondent's conversation with Ribovich, Respondent's interview took place in Sprague's office where Respondent's union attorney, Sprague, Murray, Bailey and Ribovich were present. He said the interview lasted approximately an hour and a half to two hours with breaks in between. During the breaks Respondent said he started feeling sick and Sprague would stop the recording because "I would answer certain questions and then they were like I guess I didn't say the right way then they would stop the tape and then the lawyer would talk to me."

He said that before the interview started, his union delegates were prepping him on how to answer questions, and that he went along with what they had told him because he was afraid. During the interview, Respondent said Sprague did not like his tone or the way he was answering questions. Respondent had read the Patrol Guide and pointed out what [Winant] had done wrong but was told by Sprague not to worry about what Winant had done. Respondent's union delegates then took Respondent outside for a break and told him, "It's been worked out, stick to what you know when they tell me things this like going back and forth because they stop the tape a couple of times..."

Respondent testified that he felt nauseous and felt as if the room was moving during his interview. He agreed that the points where the tape was stopped was where he said something that he was not supposed to say, such as his previous discussions with Winant about the UF-250s; about how he was a good police officer and that he did not do anything to Person A. He also told Sprague that Winant and Wright did not assist him during the incident. He did not see anyone rewind the tape, and agreed that they were discussing the facts of the incident off the record.

He agreed that his interview is not complete and is missing the part where Sprague was pounding on the table and “started telling me because I brought up discrimination thing and he was like the NYPD don’t discriminate and he was like he is tired of me w[h]ining and complaining...” Respondent also told Sprague about the problems he had with Palmeri and Winant, and that Walsh had deemed Person A an EDP.

Respondent testified that a couple of months after the incident, Person A was arrested again and he saw her in the precinct where they both greeted each other.

Respondent testified that on September 22, 2009, he learned that he was being transferred to the 76 Precinct. Murray told Respondent that he was being transferred because “they are afraid that I am going to retaliate against the other cops that won’t testify against me at my [official Department interview]...”

A month after working in the 76 Precinct, Respondent was notified that he had been transferred to the 52 Precinct. Respondent called Ribovich immediately and learned that he was getting Charges and Specifications. He said he broke down and started crying and was told to take lost time and go home.

Respondent said when he first arrived at the 76 Precinct, no one at the 76 Precinct was aware that he was being transferred there and there was no official transfer document other than the form he was given by Murray. He was also not aware of a telephone message that documented his transfer.

After working in the 76 Precinct for a month, Respondent was transferred to the 52 Precinct where he tried explaining that he was just transferred from the 76 Precinct. However, he was informed that there was no Department record indicating that he had been transferred to the 76 Precinct, but rather, Department records indicated that he was transferred from the 62 Precinct to the 52 Precinct. While working in the 52 Precinct, Respondent was contacted by the IAB investigator who he had previously spoken to, and he told the investigator that he had been transferred to the 76 Precinct and then to the 52 Precinct and also that he was getting Charges and Specifications. He agreed that he still has an ongoing IAB investigation.

Respondent performed patrol duties while in the 52 Precinct, and he was informed that there had been a spike in the seven major crimes, or index crimes, and that if an officer came across one of the seven major crimes, the officer should ask more questions, ascertain more details and conduct an investigation. Respondent understood this to mean that if he had responded to a job involving stolen property, he should ask how much the property was worth and how long the owner had owned it.

Respondent agreed that there are officers in the 52 Precinct who are discouraged from taking criminal reports because "it's going to spike up the numbers, they had a spike in numbers and they are trying to find ways to bring the numbers down. Some of them will tell you point blank at roll call, they say we can't take no more majors you guys are

not doing proper investigations, you are just taking whatever they said to you ask them questions because you know.” He said the seven major crimes include Rape, Robbery, Grand Larceny and Grand Larceny Auto and Assault.

He testified that if an officer took a report of one of the seven major crimes, the Desk Officer or another supervisor would “beat you up, they just tell you you didn’t ask enough questions why is this, why is that, and you would be like it is what it is. No, you did an improper investigation. I’m like I asked question they fill it out I do the best I could.”

He said another way supervisors would discourage him from taking reports of the seven major crimes was by checking the price of the item listed on the report against the selling price of the item on Amazon.com, and if the price was less Amazon.com, “then they would look at you and tell you like they would just change the number, they will just ask you how you know it’s worth that.” He acknowledged that he could consult the Reference Guide when taking reports for stolen property but that he was not provided with the information in the Reference Guide. He said for instance, if a police officer took a report “and they don’t like it if they said it’s going to be a seven majors they put a little sticky on it and you have to go see the crime analysis sergeant. The crime analysis sergeant will look at you and say you need more clarification so you tell him this is what the person said to me, this is what done happen, they would be like okay.”

While in the 52 Precinct, Respondent denied having been trained on how reporting was done with respect to electronics. He recalled responding to a job which involved stolen property from a vehicle and after learning from the complainant that an iPad was stolen, Respondent generated a few reports. Before changing the value of the

iPad, Respondent recalled what he had been told by his supervisors about index crimes and since the value of the iPad would make this incident an index crime (Grand Larceny), Respondent began asking the complainant more questions. He said he did not care what the value of the iPad was, whether or not it was a Grand Larceny and that he would not benefit from classifying the crime a particular way.

Respondent learned from the complainant that he had owned the iPad for about one year and that the iPad was a Verizon iPad. Respondent told the complainant that he had seen a billboard which advertised the Verizon iPad for \$499.00 but the complainant disagreed with that price. Respondent acknowledged that his comment to the complainant was not appropriate. He further acknowledged that he was asking questions not based on what he learned in the Police Academy but from what his supervisors were telling him that he should do.

The complainant had told Respondent that he got the iPad when he signed a contract with Verizon. Respondent suggested a value of \$375.00 for the iPad and the complainant agreed. Respondent agreed that he was not an expert in property evaluation or electronics and did not understand what the market value of the iPad was. He said he guessed the value of the iPad because he felt pressured to not classify it as an index crime. Respondent said he did not know what the basis was for determining if the price of an item was too high and agreed that he guessed and changed the price of the iPad based upon it not falling into the classification of an index crime. The report Respondent had taken for the iPad was reviewed, signed and approved by the Desk Officer and also by the Crime Analysis office.

Respondent testified that he and other officers were interviewed as a result of a QAD investigation but did not know if anyone else was disciplined. Respondent was not aware of other officers being retrained in the area of taking reports, nor was he offered retraining. He agreed that no one had told him that they disagreed with the way he was taking reports, and the first time he heard of this was when he was questioned by QAD.

During cross-examination, Respondent said that his current attorney represented him during his official Department interview by QAD on December 20, 2010, and that he was satisfied with the representation he received. He agreed that no member of the service in the 52 Precinct directed him to not take a Complaint Report of an index crime.

Respondent stated that during his interview he told Brill that he wrote down \$375.00 instead of \$499.00 for the iPad because he took into account that it was a year old and because an iPad was a computer. Moreover, he said, “[W]hen I first came on [the job], they were telling you one of the things the cop was allowed to write down is computers and because computer go down...I consider Ipad a computer...” However, he was informed by Brill that the Department did not consider an iPad a computer.

Respondent agreed that he told Brill that he and the complainant had a discussion before determining that the iPad was valued at \$375.00. He did not ask the complainant to write his initials after changing the value of the iPad and admitted that he [Respondent] made the change. Respondent recalled replying no when asked during his December 20, 2010, official Department interview if he had been pressured to not take a report for one of the seven major crimes, or to change the classification of a report that he felt was properly classified, or if he was aware of any crime-reporting misconduct in the 52 Precinct.

Respondent acknowledged that he changed the value of the iPad because he felt pressured to do so, and said, "If I didn't have the pressure about index crime...I don't care what they say in the report, what I know the supervisor is going to have a problem with it." He agreed that there is nothing wrong with supervisors in the 52 Precinct asking him to ascertain more details with regard to taking a report for an index crime.

Respondent testified that on August 4, 2009, after returning from traffic court, and after being advised by Walsh that he would be escorting Person A to the hospital, he took his meal and asked Floyd to bring him a sandwich. Floyd brought the sandwich but someone accidentally gave his sandwich to Person A.

Respondent testified that he was assigned to the locker room post as a result of notifying IAB with regard to an earlier incident where he had arrested a family member of a police officer. He said he was the only police officer on the third platoon to be fixed there everyday and would ask questions about why he was standing there, but he would just be told to stand there. He would not relieve another officer who would have been assigned there during another platoon and acknowledged that he was the only officer assigned to the post.

Respondent stated that Winant and Wright both tried calming Person A down but it did not work. Respondent said Winant, Walsh and Wright were standing by the cell door, and he passed them as he removed Person A, who he had placed in handcuffs, from in the cell. He agreed that he did not know if anyone was around him when he fell by the front desk and stated that EMS had held open the first set of doors for him as he was taking Person A outside. According to his September 15, 2009, official Department interview, when asked how he had opened the door, Respondent answered, "Oh, just like

like bumped through the side with my butt. I got against the side like this and I bumped through the side to go through with my left hip.” However, he maintained at trial that EMS held the door open because during the interview and prior to this answer, when Respondent mentioned EMS, Sprague “started yelling there ain’t no EMS worker there and that’s when he started calling me a liar ma’am, that’s when that part came.”

Respondent did not recall seeing Person C in the 62 Precinct on the day of the incident. He stated that although he used the word “carry,” he did not lift Person A off the ground. He agreed that he did not hear Person A make statements regarding her face being smashed or hurt. During his official Department interview, Respondent had described how he had carried Person A by saying, “Basically she doesn’t want to walk she doesn’t want to do anything...I am basically like this and I am basically using my stuff to like lift her up off the ground...”

During redirect examination, Respondent agreed that he changed the price of the iPad on the report because it was the right thing to do and because he was taught to do so.

During recross examination, Respondent agreed that he was taught that he should never change what the complainant writes on the Lost or Stolen Property/Identity Theft form. He said he never knew that the form indicated that information on it can only be changed by the complainant.

The Court questioned Respondent about his September 15, 2009, official department interview when he was asked, “All right now, are [Person A’s] feet on the ground?” and he replied:

Umm, no. She doesn’t want to walk, doesn’t want to do anything because the way it goes she is basically trying to drop her weight down so I am trying to keep her up from dropping her weight down that is why I got my back arched

so now I am carrying her underneath the armpit like this and then I stopped, I stopped in front of the desk because that is when I said my back started hurting.

Respondent maintained at trial that he did not lift Person A off the ground. He explained that he made this statement during his interview because he had been working in hot weather earlier and started feeling sick and his "body was there but the mind wasn't." In addition, he said there were off the record discussions and he was also advised by his union delegates and his lawyer to answer questions a certain way.

He further explained, "I twist the handcuff and I push her get to walk. She didn't want to walk I just pushing her to try get to the front door," and, "I just had so many people talking to me inside there [during his interview] it was like I was just saying whatever they want me to say." Respondent agreed that he was not moving Person A by holding her by her armpits, but rather, he was twisting the handcuffs and pushing her forward.

Respondent stated that his assignment to the locker room post is documented in his Activity Log. DX 6 contains Respondent's Police Officer's Monthly Performance Reports for the months of May through September, 2009.

He agreed that neither Walsh nor Winant asked him to stop while he was removing Person A from the cell to the front door.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2009 0409
Specification No. 1

Respondent stands charged herein in that while assigned to the 62 Precinct, while on duty, on or about August 4, 2009, while in the performance of said officer's police

duties, he did wrongfully and without just cause use excessive force when moving a prisoner, Person A, to wit: said Officer lifted her body off the ground, pushed her upper body into the closed doors, causing her face and upper torso to bang into the doors.

The Department presented various witnesses from different vantage points in the station house who testified that they observed Respondent rush to the front door of the station house with Person A, carrying her and then use her body to open the double doors of the station house. Police Officer Wright testified that she made the arrest of Person A. At the station house, Lieutenant Winant directed Respondent to transport Person A to the hospital because she was on [REDACTED]. Wright said she was walking behind Respondent and Person A instead of with them because Person A was now in Respondent's custody. She acknowledged that from that position she could not see what was directly in front of Person A. In her official Department interview, Wright said Person A was leaning back and not attempting to leave the station house.

Wright stated that the doors to the station house were closed and as Respondent approached the doors, he walked quickly, lifted Person A and pushed her through the door. She said Person A's body went through the door first and she could not tell if her feet were lifted off of the ground. Wright heard Person A use racial slurs, curse and spit on Respondent. Person A was then escorted to the ambulance where she was placed on a gurney and a mask was placed over her face. Wright said during the transport of Person A to the ambulance she never lost sight of Respondent and he did not trip, fall to the ground or kneel. She also said that there was a big rug before the double swinging doors, but that the rug was flush against the floor.

During cross-examination, however, Wright backed away from her statement that Respondent "lifted" Person A. She acknowledged that she did not mention in her official Department interview that Person A was lifted off of the ground by Respondent. She then testified that Respondent "pushed" Person A through the doors. Wright testified that she was slightly behind Respondent and to the right as he escorted the prisoner out.

Winant testified that he was at the desk initially when he realized that Person A needed medical attention. He asked Respondent to transport her to the ambulance. Winant said at that point that he stayed in the cell area along with Respondent and Person A to make sure that she did not make allegations against them. As Respondent began to walk Person A to the front doors, he began to walk quickly and Winant was trying to catch up. He said initially Respondent held her by the arms as he was supposed to since she was handcuffed. Winant estimated that it was approximately 50 feet from the cell area to the front door. When Respondent was about eight to ten feet from the door, Person A put her feet down and demonstrated that she did not want to walk or go. Respondent then put his arms on her elbows, picked her up off the ground and pushed her into the door. Winant described her head, face and shoulders making contact with the doors.

Lieutenant Walsh testified that he was covering the front desk while Winant took a meal break. He could see the cell area as well as the front door from where he was working. He stated that he did not hear Person A curse and he was unaware that she needed medical attention, but later was advised by someone that she needed medical care so he directed Respondent to take Person A to the ambulance. Walsh testified that he observed Respondent as he pushed Person A into the front door. He also stated that he heard Person A say that the officer pushed her into the door.

The Department also presented the hearsay statement of Principal Administrative Associate Person C (DX 1).² Person C stated in sum and substance that she was standing at the front desk when she witnessed Respondent escort a prisoner who was rear handcuffed. The prisoner was struggling with him and Respondent lifted her up and “banged her really hard” into the door. Person C said the prisoner’s face hit the door. She said Wright, Winant and two EMS personnel followed behind Respondent. She did not hear the prisoner say anything, but the prisoner did grunt as she hit the door and there was a loud noise. She also stated that Respondent did not give anyone the opportunity to open the door for him.

From the witness vantage points, it is clear that no one came close enough to Respondent to render any assistance. Likewise, Respondent did not seek the assistance of anyone in the command either. When he approached the door, he did not yell for someone to open the door. However, by all accounts, Respondent approached the door, lifted Person A and used her body to open the station house door.

Person A being pushed into the precinct doors, face and head first, was not corroborated by any physical evidence. Person A was interviewed the following day. She did not have any injuries to her face or head and stated that she did not sustain any injuries. She recalled spitting at Respondent, saying “bad things” to him, but she had no recollection of being pushed into the door. Her lack of memory regarding the incident could be due to the fact that she was on [REDACTED].

The Assistant Department Advocate argued that there was no need for injury for a finding of excessive force to have been used. To support this notion, the Assistant Department Advocate cited Disciplinary Case No. 85339/09 (April 5, 2010). In that case,

² Person C is a retired member of the service.

a member of the service pleaded Guilty to striking a prisoner once and negotiated a penalty of 15 vacation days. No injuries were sustained by that prisoner.

Respondent, on the other hand, gave conflicting accounts as to what transpired. During his official Department Interview, which was held on September 15, 2009, approximately six weeks after the incident date, Respondent gave a very detailed account of what took place without interruption from the interviewer. According to the transcript in evidence (DX 2B), Respondent gave an account from page 7 to the top half of page 10 without interruption. He stated that he struggled with Person A who was cursing, spitting and planting her feet on the ground so not to be removed to the ambulance. He lifted her from the cell area to the front desk in an effort to quickly get her to the ambulance before she continued to spit on him. He gave a detailed account of how he had to stop by the desk because his back was hurting from lifting Person A. He explained:

So basically, I bum-rushed her, I...grabbed her, pinned her up against the wall, and... Wright, next to me, holding like, one hand, while I cuffed her up. Cuffed her up, all of a sudden, she just dropped limp. Don't want to walk, don't want to do nothing. So I picked her up, and I'm carrying her....I'm carrying her, I stopped in front of the desk, because she was limp, so, at that time I was getting tired because my, my back was starting to kill me. So I picked her up, and I carried her towards the front row.

There was no indication to this Court that Respondent, although from Jamaica, had any difficulty with the English language and expressing what had transpired. He clearly said that he lifted Person A. There would be no reason for Respondent to have back aches if all he did was push Person A from the cell area to the front door. As he approached the front door, Respondent continued in the interview that he tripped and fell

along with Person A. He quickly lifted Person A from the fall and an EMS worker came from the cell area and opened the command door for him.

At trial, Respondent testified during direct examination that once he fell to the floor, an EMS worker who was behind him ran forward and opened the door for him, so he quickly lifted Person A up off the floor and went through the partially opened door. He continued with his statement that there came a time when, "I carried her through the door." Respondent's attorney interjected and asked Respondent what he meant by "carry" and where was he from. Respondent replied that he was from Jamaica and that when he said carry he meant, "Like walk her out the front door." Respondent then denied that he physically picked up Person A and carried her out the door. Respondent continued his testimony that he "picked up" Person A. When his attorney questioned him as to what he meant by "picked up," Respondent explained, "I picked her up off the ground and we walked out the door."

This is inconsistent with what Respondent stated during his interview. He said he had to carry Person A down the command stairs. He explained, "She's like kicking, spitting, but I stopped at the bottom of the stairs 'cause I had to carry her down the stairs, because she didn't want to walk, she didn't want to do nothing. So I stopped at the bottom of the stairs catching my breath." Respondent stated at his interview that he had to lift Person A up and carry her outside down the command stairs because she did not want to walk to the ambulance.

Respondent at trial explained that EMS was in the process of opening the door so he went through and pushed Person A out of the door because she continued to resist his movement. He stated that he continued to push her until they arrived at the ambulance.

From what he recalled, Walsh, Winant and Wright were talking near the cell area and never came to assist him with the transport of the prisoner. Nor did any other officer help. Respondent said when he arrived by the ambulance, there was a ramp. EMS assisted him as they lifted Person A onto the ambulance and a face shield was placed on her to stop her from spitting.

Respondent reiterated this account during cross-examination until he was confronted with another portion of his statement from his official Department interview. When confronted with page 16 lines 20-21 of his official Department interview, Respondent then stated that he fell and once up, he used his hip to open the door. Respondent heard the following question at his official Department interview and gave the following answer at that interview:

Lieutenant Murray: Okay, so tell me how you opened the door.

Respondent: Oh, just like, like, like, bummed through the side, like with my butt. I got against the side like this and I like bummed through the side to go through.

Deputy Inspector Sprague: Your left hip?

Respondent: Yes.

Once confronted with this statement at trial, Respondent adopted this account and said that he used his hip to get through the command door.

Again during cross-examination, Respondent denied ever picking up Person A other than when she fell, but during his official Department interview, he gave a very detailed account of lifting up Person A from the cell area until he could not carry her anymore and stopped at the front desk to gather himself because his back hurt and then he continued on to the front door with her in a quick succession. All the witnesses testified to seeing

Respondent lift Person A and use her body to get through the door. Even if they were inconsistent as to who walked first or second toward the door, they all said Respondent used Person A to open the command door. Even Walsh and Person C, who stood by the front desk, said the same thing. Person C noted that Respondent never asked for help opening the door. No one saw EMS hold the door open for Respondent as he testified to.

Given the inconsistencies in Respondent's testimony, particularly saying at one point he used his hip to open the door, and then at another point testifying that EMS held the door open for him and Person A to get through, I find Respondent's account to lack credibility. Several witnesses confirmed that Respondent used Person A's body to open the command door, and such force was excessive.

Accordingly, Respondent is found Guilty of Specification No. 1.

Specification No. 2

Respondent stands charged herein in that while assigned as indicated in Specification #1, on or about September 15, 2009, while on-duty, he did wrongfully impede a Department investigation, to wit: said officer made misleading statements at his official Department interview to Department investigators regarding his transport of a handcuffed prisoner.

As stated in Specification No. 1, Respondent, during his official Department interview stated that he tripped, stumbled and fell with Person A as he attempted to exit the station house with her. He said an EMS worker ran up and opened the command door for him and he lifted up Person A from the floor and they went through the doors. Later in the same interview, Respondent stated that he used his left hip to go through the doors.

Despite a command full of people watching Respondent escort Person A out of the station house, no one observed him either fall with Person A at the door, nor observed EMS open the door for them to get out of the command. When Respondent stated that he used his hip to get out of the doors, he was instructed about being truthful during his interview, but he stated that he was being truthful.

Respondent's varied accounts of having the command door opened for him by EMS as well as using his left hip to open the door leads this Court to believe that he gave misleading statements during his official Department interview. There were long periods of time when Respondent gave his account of what transpired without interruption, allowing him to explain what occurred.

Accordingly, I find Respondent Guilty of Specification No. 2.

Disciplinary Case No. 2011 3671
Specification No. 1

Respondent stands charged herein in that while assigned to the 52 Precinct, on or about July 23, 2010, he did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer improperly lowered the value provided by a complainant regarding a stolen Apple "iPad" computer on a complaint report without justification.

Evidence adduced at trial established that Respondent, while performing patrol duties within the confines of the 52 Precinct was informed that there was a spike in the seven major crimes and that officers involved in these matters needed to ask more

questions, get more details and conduct an investigation.² Respondent stated that he took this information to mean that he had to ask how much property was worth to a complainant and how long the complainant had the property before he did a stolen property report. Respondent further stated that he was not trained in the 52 Precinct on how to do a report on electronics and how to value such equipment.

Respondent testified that he responded to a job that involved a complainant whose iPad was stolen from his vehicle. The complainant gave him a number as to the value of the iPad and that value was entered onto the report. Respondent testified that he recalled what the supervisors said regarding the spike in index crimes, so he conducted more of an investigation to ascertain the true value of the iPad. He learned that the complainant had the iPad for one year and that it was a Verizon iPad. Respondent said that he suggested a value of \$375.00 and the complainant agreed. He testified that he guessed on the value of the iPad because he felt pressure to not classify the device as an index crime, i.e., grand larceny. In addition, since the device was one year old and a computer, he thought the value of the iPad had depreciated, so he changed the value on the form to the lower dollar amount, \$375.00.³

Brill, a lieutenant from the Quality Assurance Division (QAD) had been investigating allegations in the 52 Precinct that robbery reports were being downgraded and that the Crimes Analysis Sergeant was changing real charges to fake ones. During the course of his review of over 830 reports, he flagged a few where there were alterations to the property value. He interviewed Respondent with respect to his report

² Seven major crimes according to Police Department records refer to: murder, rape, robbery, felony assault, burglary, grand larceny and grand larceny auto.

³ Although Respondent testified to this number, \$375.00, examination of DX 4, as Brill had testified, shows the number Respondent wrote over the original entry on the form was \$325.00.

where there was a handwritten change to a property value. Brill testified that the report clearly indicates that any change to the form can only be done where the complainant initials each change. Brill testified that the iPad was listed at a value of \$825.00, but that Respondent had changed the value to \$325.00, information he learned from Respondent during an interview. Brill could not recall if in his communications with the complainant, that the complainant noted that the iPad had depreciated in value. Brill further testified that the Department does not consider an iPad to be a computer as Respondent testified to.

By all accounts, Respondent reaped no benefits by lowering the value of the iPad on the stolen property form other than to have one less item counted as a Grand Larceny in the precinct index crime report. He testified that he felt pressure to lower the amount so that his command would not have a spike in index crimes. Respondent, however, did not have a justifiable basis with which to lower the value of the iPad to the amount he did in contradiction to what the complainant said. He had not checked the value of iPads to know that the value he selected as a lower value was reasonable. He did not follow Department procedure which was to have the complainant initial the revised, lowered amount on the Lost or Stolen Property/Identity Theft form (DX 3) to indicate that the complainant was in agreement with the reduction in value. Respondent also decided not to note on the stolen property form that the value of the iPad would be lowered or reduced in value due to depreciation. Respondent also did not insure that the Complaint Report Worksheet (DX 4), which listed the iPad value as a changed amount of \$325.00 was in agreement with the value listed in the stolen property form, which appeared to have a changed value from \$825.00 to \$925.00. These records are official Department

records kept by the Department in the course of business. Any changes to these records have to be made in accordance with Department protocol, particularly since there was no indication that the complainant was in agreement with this reduction. For all these reasons, Respondent's change to the value of the iPad was without justification.

Respondent argued that he had not been trained by the Department on how to value electronic devices. All the more reason for him not to have a basis to lower the value from what the complainant said the iPad was worth. In addition, Respondent thought the iPad was a computer, which tend to depreciate in value from year to year. Brill testified that the Department does not consider an iPad to be a computer. Yet, in the drafting of the charges, the iPad was referred to as a computer. Nevertheless, this tribunal has already established that the lower amount Respondent decreased the value to, was an arbitrary amount and was not justified.

Accordingly, Respondent is found Guilty of Specification No. 1 in Disciplinary Case No. 2011-3671.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of using excessive force against a prisoner, making misleading statements at his official Department interview and improperly

lowering the value provided by a complainant regarding a stolen iPad on a Complaint Report without justification. The Assistant Department Advocate asked for a penalty of the forfeiture of 30 vacation days.

Based on the above, the recommended penalty of the Assistant Department Advocate is not, on balance, unreasonable and therefore that is the recommendation of this Court.

Accordingly, it is recommended that Respondent forfeit 30 vacation days.

Respectfully submitted,


Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

APPROVED

FEB 01 2013
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DAMIAN MCINTOSH
TAX REGISTRY NO. 942167
DISCIPLINARY CASE NOS. 2009-0409 & 2011-3671

In 2009, 2010 and 2011, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluations. Respondent has received no medals in his career to date.

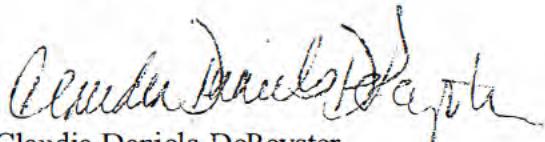
[REDACTED]

[REDACTED]

[REDACTED]

Respondent has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials